UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

In the matter of

GARY DEVELOPMENT COMPANY CO., INC. : Docket No. RCRA-V-W-86-R-45

Respondent

OPINION AND ORDER DENYING MOTION TO DISMISS

Respondent contends in a two-pronged attack upon the complaint that the United States Environmental Protection Agency (EPA) lacks jurisdiction in this case. First, respondent argues that complainant is precluded from bringing enforcement actions in a State that has received the appropriate authorization under the Resource Conservation and Recovery Act (RCRA) to commence closure proceedings. Second, respondent argues that the doctrines of res judicata and collateral estoppel bar this action, since respondent and the State of Indiana had previously entered into a settlement agreement and recommended agreed order which governed the construction and operation of respondent's facility.

Taking first the argument that EPA lacks jurisdiction to en-

force solid waste statutes and regulation in Indiana, respondent cites administrative and judicial decisions in Northside Sanitary Landfill, Inc. 1/ The argument is essentially that complainant's case against respondent involves precisely the same issues as Northside, yet there the EPA hearing which Northside sought was denied to it while here an EPA proceeding is insisted upon. 2/ Respondent considers the two results to be inconsistent: either parties are entitled to an EPA hearing or they are not. Respondent contends that the issue in this proceeding is in reality closure of a facility, which, in Northside, was held to be outside EPA's authority because the State had been granted authority to enforce its solid waste program.

Complainant asserts that the action here is an enforcement proceeding rather than a closure determination, and points to U. S. Conservation Chemical Co. of Illinois 3/, which holds that EPA retains enforcement authority in RCRA-authorized States.

The State of Indiana was granted Phase I interim authorization to enforce a hazardous waste program in lieu of the federal program on August 18, 1982. Under a Phase I authorization, EPA retains the

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1/ In the matter of Northside Sanitary Landfill, Inc., RCRA Appeal No. 84-4 (Order on Reconsideration, November 27, 1985) and Northside Sanitary Landfill, Inc. v. Thomas, 804 F. 2d 371 (7th Cir. 1986).

2/ TR, p. 21.

3/ 660 F. Supp. 1236 (N. D. Ind. 1987)

authority to issue permits while the authorized State conducts closure proceedings for interim status facilities. Final authorization was granted to Indiana effective January 31, 1986, by an order dated the same day. 5/ Such authorization allows Indiana to issue permits under standards corresponding to those found at 40 CFR Part 270, and to enforce standards which correspond to those found at Part 270, and to enforce standards corresponding to those found at Part 264. However, Indiana was and is subject to the limitations on its authority imposed by the Hazardous and Solid Waste Amendments of 1984 (HSWA). 6/ As a result, there is a dual federal/state regulatory program in Indiana. To the extent the authorized state program is unaffected by HSWA, the state program is authorized to operate in lieu of the federal program. Where HSWA related requirements apply, however, EPA will administer and enforce them until a cooperative agreement is signed by Indiana and EPA. 7/

The complaint alleges that respondent failed to file with EPA a timely notification of its hazardous waste activity as required by RCRA §3010(a), 42 U.S.C. §6930(a) (i. e. by August 18, 1980). It is further alleged that on November 18, 1980, respondent did submit Part A of the permit application as required by RCRA §3005(a),

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5/ 51 Fed. Reg. 3953.

6/ RCRA §3006(g), 42 U.S.C. §6929(g)

7/ 51 Fed. Reg. 3954.

42 U.S.C. §6925(a), and 40 CFR §270.1(b). However, timely submission of both parts is required to qualify owners/operators of existing hazardous waste facilities (who are required to have a permit) for interim status under RCRA §3005(e), 42 U.S.C. §6925(e). Although EPA representatives allegedly corresponded with respondent early in 1985, respondent allegedly failed to submit a Part B permit application or certify compliance with applicable RCRA groundwater monitoring and financial requirements by November 8, 1985, as required by RCRA §3005(e)(2) and 40 CFR Part 265.

It is determined that this administrative action is a clear enforcement proceeding, brought upon complainant's belief that interim status was not achieved by respondent and that hazardous waste therefore could not be handled at respondent's facility, as complainant alleges is the case. While it may be that this proceeding has a closure aspect, that does not preclude complainant from undertaking enforcement where it determines enforcement to be necessary, and where the State has been notified as required by the Act. The complaint, issued pursuant to RCRA §3008(a)(1), charges violations of RCRA §§ 3004 and 3005, and of 40 CFR §§270.1(b) and 270.10(a), as well as violations of relevant provisions of the Indiana administrative code and regulations. 8/ If complainant is able to prove its

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8/ For purposes of a motion to dismiss the pleadings must be construed liberally, Strauss v. City of Chicago, 760 F. 2d 765, 776 (7th Cir. 1985); the court must accept as true all material allegations of the complaint, Wilson v. Harris Trust and Savings Bank, 777 F. 2d 1246, 1247 (7th Cir. 1985), and construe the complaint in favor of the complainant, Worth v. Seldin, 422 U.S. 490, 501 (1975).

allegations, respondent will not be able to introduce hazardous waste into the landfill at its facility. No more clear use of enforcement authority, which EPA retains under the provisions of RCRA, can be imagined.

To the extent that an argument is made here that RCRA §3008 does not authorize complainant to enforce state law and regulations in a solid waste authorized state, it is noted that this argument has been considered and rejected in numerous administrative and federal district court decisions which hold that EPA does retain enforcement authority where a state has been granted final authorization, provided only that notification to the state is given. RCRA §3008(a)(2), 42 U.S.C. §6928(a)(2), provides:

> In the case of a violation of any requirement of this subchapter where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 6926 of this title, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section.

The clarity of the provisions of this section is such that there can be no doubt that EPA retains enforcement authority in authorized States. 9/

9/ United States v. Conservation Chemical of Illinois, 660 F. Supp. 1236 (N.D. Ind. 1987).

In its second argument, respondent asserts that complainant is barred from maintaining this action by the doctrines of res judicata and collateral estoppel because respondent was a party to Cause No. N-53, a settlement agreement and recommended agreed order (SARAO) issued on February 18, 1983, in a proceeding before the Environmental Management Board of the State of Indiana (EMBI). With respect to the issue of res judicata, respondent alleges that (1) privity exists because EPA granted Indiana authorization to administer its hazardous waste program in lieu of the federal program; (2) closure is an issue which "could have been raised" during the State proceeding that resulted in the SARAO; and (3) litigation was pending between respondent and the Indiana Department of Environmental Management as to the construction and operation of respondent's facility. With respect to the issue of collateral estoppel, respondent alleges that mutuality exists due to the privity between Indiana and EPA established by RCRA, the Indiana Environmental Act and the complaint itself; and (2) Indiana law construes certain consent decrees or agreed orders as having the same effect as a final judgment.

Complainant responds that res judicata is inapplicable to this proceeding because Cause No. N-53 does not constitute a final judgment on the merits; further, complainant asserts, the same parties are not involved and there was no privity with the parties who were involved. Further, complainant asserts that Cause No. N-53

and the present matter do not arise from the same cause of action. Last, complainant argues that the bar of collateral estoppel is inappropriate because nonmutual collateral estoppel cannot be asserted against the federal government.

Briefly, under the doctrine of res judicata, a judgment on the merits in a prior suit bars a subsequent suit involving the same parties or those in privity with the parties based upon the same cause of action. 10/ Under the doctrine of collateral estoppel, the subsequent suit involves a different cause of action but the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the earlier action. Indiana law is in accord with these definitions. 11/

Cause No. N-53 involved respondent's petition for a hearing to contest conditions placed in operating and construction permits for respondent's sanitary landfill facility. The petition was filed in 1982, but concerns an agreed order approved in 1980. Since Indiana was not granted Phase I interim authorization until

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10/ Enlightening discussions of res judicata and collateral estoppel are found in the following: Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, et al., 402 U.S. 313 (1971); Parklane Hosiery Co., Inc. , et al. v. Shore, 439 U.S. 322 (1979); Federated Department Stores, Inc. et al. v. Moitie, et al., 452 U.S. 394 (1981); United States v. Mendoza, 464 U.S. 154 (1984); United States v. Stauffer Chemical Co., 464 U.S. 165 (1984). Res judicata also precludes relitigation of issues that could have been raised in an earlier action.

11/ See, for instance, The South Bend Federation of Teachers v. National Education Association - South Bend, 180 Ind. App. 299, 389 N.E. 2d 23 (1979).

August 18, 1982, those proceedings could not have involved issues or alleged violations found in the complaint here filed pursuant to RCRA §3008(a)(1). The cause of action here relates to respondent's alleged failure to comply with statutory and regulatory requirements for achieving interim status for operation of a hazardous waste facility. Similarly, collateral estoppel cannot bar this action inasmuch as the hazardous waste issues were not necessary to a disposition of respondent's objections to conditions placed on its construction and operating permits.

Inasmuch as the earlier cause of action and the present complaint bear little resemblance to each other, and since hazardous waste issues were not necessary to a disposition of Cause No. N-53, no further aspects of the res judicata/collateral estoppel arguments need be reached.

The motion to dismiss is denied.

J. F. Greene
Administrative Law Judge

Washington, D. C.
September 29, 1989

CERTIFICATE OF SERVICE

I hereby certify that the Original of this Order was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on October 4, 1989.

Shirley Smith
Secretary to Judge J. F. Greene

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